PROSECUTORIAL MISCONDUCT

What Is Prosecutorial Misconduct?
(Courts are not clear on what it is.)

A. *Fairly clear when tied to a specific constitutional right.*

May not comment on defendant's failure to testify at trial. *Griffin v. California*, 380 U.S. 609 (1965)

May not comment upon *Miranda*-induced silence. *Doyle v. Ohio*, 426 U.S. 610 (1976)

May not comment on post-arrest silence, even if not *Miranda*-induced. *State v. VanWinkle*, 229 Ariz. 233, 273 P.3d 1148 (2012)

May not comment upon defendant's refusal to consent to a search. *State v. Stevens*, 228 Ariz. 411, 267 P.3d 1203 (App 2012)

Must disclose to defense any exculpatory evidence—including impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1973) This obligation applies not only to evidence *known* to the prosecutor, but to *any* evidence within the possession of the prosecution office, *or* in the possession of the law enforcement agencie(s) involved in the investigation and/or prosecution of the case. *Kyles v. Whitley*, 514 U.S. 419 (1995).

B. *Murky when there is no underlying constitutional right.*

Donnelly v. DeChristoforo, 416 U.S. 637 (1974)
Darden v. Wainwright, 477 U.S. 168 (1986)

A claim of prosecutorial misconduct does not impinge upon any guaranteed constitutional right—other than general "due process."

To constitute a violation of due process, the prosecutor's conduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

"[I]t is not enough that the prosecutor's [actions] are undesirable or even universally condemned."

Arizona *appears* to follow *Darden* and *DeChristoforo*:

> To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985) (quoting *United State v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977))); *see also State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct.

State v. Hughes, 193 Ariz. 72, 79, ¶ 26, 969 P.3d 1184, 1191 (1998). BUT, the Arizona Supreme has recently called that into question:

> In reviewing prosecutorial misconduct claims, we first review each allegation individually for error. *See Roque*, 213 Ariz. at 228 ¶ 154, 141 P.3d at 403. We will find an error harmless if we can say beyond a reasonable doubt that it did not affect the verdict. *See, e.g., State v. Nelson*, 229 Ariz. 180, 189 ¶ 36, 273 P.3d 632, 641, *cert. denied*, —— U.S. ——, 133 S.Ct. 131, 184 L.Ed.2d 63 (2012). We then consider whether the cumulative effect of individual allegations "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79 ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.#d.2d 431 (1974)).

State v. Payne, 233 Ariz. 484, 511, ¶ 106, 314 P.3d 1239, 1266 (2013).

Vouching

There are two types of vouching:

(1) The prosecutor places the prestige of the government behind a witness—normally consists of prosecutor's personal assurance that a witness is reliable or truthful. *State v. Forde*, 233 Ariz. 543, 563, ¶¶ 71–72, 315 P.3d1200,1220 (2014):

During closing argument, the prosecutor addressed the credibility of Gina's identification of Forde as follows:

> What mother would not want to sit up on the stand after you have heard the police had arrested a woman accused of murdering your daughter and say, absolutely that is the woman.
>
> But she didn't do that. What she told you was, and I submit to you honestly, was, no, I just can't tell you, I don't know her. I think those were Gina's words. I don't know her. I can't tell you that's the same person, but she looks just like that person.

Forde argues that by using the phrase, "I submit to you honestly," the prosecutor improperly vouched for Gina by placing the prestige of the State behind her. *See State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (holding that a prosecutor commits improper vouching by placing the prestige of the government behind a witness).

We agree with Forde that the prosecutor improperly vouched for Gina by conveying his personal belief that she had testified honestly. *See State v. Lamar*, 205 Ariz. 431, 441 ¶ 54, 72 P.3d 831, 841 (2003). But the misconduct did not result in fundamental error.

To avoid this claim, try to avoid using the pronoun "I" – simply refer to the evidence, i.e., "the evidence establishes that Officer Smith was truthful."

(2) The prosecutor suggests or insinuates that information not presented to the jury supports a witness' testimony or the State's case.

To avoid this claim do not make ambiguous statements, and do not refer to the "charging" process or evidence not admitted at trial. *See State v. Leon*, 190 Ariz. 159, 161–63, 945 P.2d 1290, 1292–94 (1997). Again, *always* tie your argument to the evidence presented at trial.

If you tie your comments to the evidence, you will avoid claims of vouching. Also, stating "the evidence establishes" or "the evidence shows" is much more persuasive than stating "I think," "I believe," or any other first person assertion.

Rule 15 Disclosure/Brady

If in doubt, *disclose it.*

Obviously, disclose all DRs (may have to redact).

Under *Brady/Kyles*, prosecutor is responsible for *everything* in the possession of the law enforcement agencies involved in the investigation and prosecution of the case. —Imperative to impress upon police that they must turn over to you *everything* arguably related to the case. They do not decide if something is potentially exculpatory—*You do.*

Rule 15.1(f):

> **Disclosure by Prosecutor.** The prosecutor's obligation under this rule extends to material and information in the possession or control of any of the following:
>
> (1) The prosecutor, or members of the prosecutor's staff, or,
>
> (2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or,
>
> (3) Any other person who has participated in the investigation or evaluation of the case and who his under the prosecutor's direction or control.

Jail Calls

If you, anybody in your office, *or* anybody in any law enforcement agency involved in the investigation, obtains copies of the defendant's jail calls, they *must* be disclosed to the defense—*even if you do not intend to admit or use them at trial.*

Rule 15.1(b)(2) requires the State to disclose "All statements of the defendant" "[w]ithin the prosecutor's possession or control."

ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected by any applicable privilege;

(2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

(g) *when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense* of which the defendant was convicted, the prosecutor *shall*:

> (1) *promptly disclose* that evidence to *the court in which the defendant was convicted and to the corresponding prosecutorial authority, and* to *defendant's counsel or*, if defendant is not represented, *the defendant and the indigent defense appointing authority in the jurisdiction*, and
>
> (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, make *reasonable efforts* to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter.

(h) When a prosecutor knows of *clear and convincing evidence* establishing that a defendant *in the prosecutor's jurisdiction* was convicted of an offense that the defendant did not commit, the prosecutor *shall take appropriate steps*, including giving notice to the victim, to set aside the conviction.

(i) A prosecutor who *concludes in good faith* that information is not subject to subsections (g) or (h) of this Rule does not violate those subsections *even if this conclusion is later determined to have been erroneous.*

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simple that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon he basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspectwho has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements ER 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have sever consequence for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with ER 3.6 (b) or (c).

[6] Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] *Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently.*

THE PROSECUTOR DID NOT COMMIT MISCONDUCT OR FUNDAMENTAL ERROR IN HIS CLOSING ARGUMENT

Appellant asserts that the prosecutor engaged in "repeated misconduct" by using the word "I" "no less than *five* (5) times" during the course of his closing argument. (O.B. at 8–11, emphasis in original.) This claim is frivolous, and partially forfeited because Appellant objected only twice. The prosecutor was clearly speaking as an agent of the State and directing his remarks at the evidence presented at trial. There is no "misconduct," let alone misconduct of such magnitude that Appellant did not receive a "fair trial."

A. STANDARD OF REVIEW AND APPLICABLE LAW.

Where a defendant fails to make a timely and specific objection to alleged misconduct in a prosecutor's closing argument, review is limited to "fundamental error." *State v. Martinez*, 218 Ariz. 421, 426–27, ¶¶ 15–16, 189 P.3d 348, 353–54 (2008); *see also State v. Henderson*, 210 Ariz. 561, 567–69, ¶¶ 19–26, 115 P.3d 601, 607–09 (2005). To establish fundamental error, a defendant must affirmatively prove: (1) that there was error; (2) that the error was fundamental, *i.e.*, that "the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, *and* is of such magnitude that he could not have received a fair trial;" and (3) resulting prejudice. *Henderson*, 210 Ariz. at 567–68, ¶¶ 20–26, 115 P.3d at 607–08 (emphasis added). "[T]he burden of persuasion in fundamental error review [is] on the defendant." *Id.* at 567, ¶ 19, 115

P.3d at 607. This is to "discourage a defendant from taking his chances on a favorable verdict, reserving the hole card of a later appeal on a matter that was curable at trial, and then seeking appellate reversal." *Id.* (internal punctuation and citation omitted); *see also State v. Valdez*, 160 Ariz. 9, 13, 770 P.2d 313, 317 (1989). A defendant must timely object to provide "the trial court the opportunity to cure any error." *State v. Moody*, 208 Ariz. 424, 464, ¶ 173, 94 P.3d 1119, 1159 (2004).

To prevail upon a (preserved) claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998); *State v. Lee*, 189 Ariz. 608, 616, 994 P.2d 1222, 1230 (1997); *State v. Canion*, 199 Ariz. 227, 236, ¶ 41, 16 P.3d 788, 797 (App. 2000). A denial of "due process" is a denial of "fundamental fairness shocking to the universal sense of justice." *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 828 (1990). The defendant must demonstrate that the prosecutor's remarks, viewed in the context of the entire trial, rendered the trial "fundamentally unfair." *Donnelly*, 416 U.S. at 645. In other words, misconduct alone is not sufficient to warrant the granting of a new trial—the defendant must have been denied a "fair trial" as a result of the prosecutor's

misconduct. *See State v. Bolton*, 182 Ariz. 290, 307, 896 P.2d 830, 847 (1995); *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000); *Hughes*, 193 Ariz. at 80, ¶ 32, 969 P.2d at 1192; *State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (1991). The misconduct must be "so pronounced and persistent that it permeated the entire trial and probably affected the outcome." *Bolton*, 182 Ariz. at 307, 896 P.2d at 847; *see Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191; *Lee*, 189 Ariz. at 616, 944 P.2d at 1230.

A prosecutor may not "vouch for the credibility of the State's witnesses." *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984). "Two forms of impermissible vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness' testimony." *State v. Doerr*, 193 Ariz. 56, 62, ¶ 24, 969 P.2d 1168, 1174 (1998) (quoting *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989)). "The first type of vouching consists of personal assurances of a witness' truthfulness. The second type involved prosecutorial remarks that bolster a witness' credibility by reference to material outside the record." *State v. Dunlap*, 187 Ariz. 441, 462, 930 P.2d 518, 539 (App. 1996) (quoting *State v. King*, 180 Ariz. 268, 277, 883 P.3d 1024, 1033 (1994)). However, counsel is afforded "wide latitude" in closing argument and may comment upon the evidence as well as all reasonable inferences to be drawn

from the evidence. *State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990); *see also Martinez*, 218 Ariz. at 427, ¶ 19, 189 P.3d at 354; *Hughes*, 193 Ariz. at 85, ¶ 59, 969 P.2d at 1197. When a prosecutor's characterization of a witness is "sufficiently linked to the evidence," it will not be deemed vouching even if, taken out of context, it may appear to place "the prestige of the government" behind a witness. *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997); *see also State v. Lee*, 185 Ariz. 549, 554, 917 P.2d 692, 697 (1996) ("read in context," prosecutor's comments, "I think [the witness was] honest," and "I think [another witness] was an honest man," who "made an honest mistake" were not vouching).

A. ANALYSIS

Appellant references each instance in which, during his initial closing argument, the prosecutor used the word "I," then takes those statements entirely out of context to give the false impression that the prosecutor was stating his personal opinion. (O.B. at 8–9.) However, read in context—as the law requires—the prosecutor, as an agent of the State, was merely pointing out that the evidence supported the charges and the victims' trial testimony. As acknowledged by Appellant, he objected only twice (*id.* at 9), so three of the alleged instances of misconduct are reviewed only for "fundamental error." *See Martinez*, 218 Ariz. at 426–27, ¶¶ 15–16, 189 P.3d at 353–54. Regardless, there is no "error" whatsoever,

and certainly none approaching the lofty level of a due process violation. *See Donnelly*, 416 U.S. at 643–45; *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191.

The prosecutor began his closing argument as follows:

> Good morning. *What the evidence has show* [sic] that well beyond a reasonable doubt in this case, I would submit it's undisputed in this case, are several facts:

(R.T., Day 4, at 34, emphasis added.) There was *no* objection, and the prosecutor went on to summarize the facts that were not in dispute. (*Id.* at 34–35.) The prosecutor then began his discussion of other "facts" as follows:

> *What I believe*, in addition to those undisputed facts, *there are a number of facts that have been established by the competent and the credible evidence*, and his is well beyond any reasonable doubt:

(*Id.* at 35, emphasis added.) Again, there was no objection, and the prosecutor commented on the evidence presented at trial, some "undisputed," some arguably in dispute. (*Id.* at 35–36.)

The prosecutor then moved on to discuss the evidence regarding facts that Appellant claimed were in dispute (though there was really no evidentiary basis for Appellant's assertion):

> What *I think the facts show* are, beyond any reasonable doubt, that Lori K[.], after being struck by that discharged bullet from the firearm which was in his hand, fell to the ground, and she bled where she fell down; large amounts of blood, well within her bedroom.

> Mark and Lori were inside the bedroom door when the defendant confronted them with his loaded, cocked revolver that was in his hand.
>
> Mark was in reasonable apprehension. That's why he made an attempt to grab that firearm away from the defendant.
>
> *I believe* the –
>
> MR. COCHRAN [Appellant's counsel]: Your Honor, I'm going to object at this point. *Vouching.*
>
> THE COURT: Mr. Young, *I'll sustain that*, and I think *it's just habit*, but –
>
> MR. YOUNG: -- *the competent and credible evidence will show* is that Mark F[.] did not touch the gun, did not have contact with the defendant's hand or arm prior to the discharge.

(*Id.* at 36–37; emphasis added.) Thus, the trial court sustained Appellant's objection,[1] and Appellant sought no further remedial action. (*Id.* at 37.)

Toward the end of the prosecutor's initial closing argument, Appellant made another "vouching" objection which was overruled.

> *You need to find the facts*. I've indicated the facts that appear to be undisputed. And *what I believe the evidence shows well beyond any reasonable doubt* - -
>
> MR.COCHRAN: Objection, Your Honor - -

[1] It is, at the very least, debatable whether the trial court should have sustained Appellant's "[v]ouching" objection. Had the prosecutor completed his statement prior to the objection and ruling, he would have said, "I believe the . . . competent and credible evidence will show . . ." (R.T., Day 4, at 36–37.) This *clearly* would not have been "vouching." *See Lee*, 185 Ariz. at 554, 917 P.2d at 697, *Corona*, 188 Ariz. at 91, 932 P.2d at 1362. However, the issue was rendered moot when he trial court prematurely sustained Appellant's objection.

MR. YOUNG: - - and you'll - -

MR. COCHRAN: - - vouching again.

THE COURT: I'll overrule it.[2] Continue, Mr. Young.

MR. YOUNG: - - *you'll be able to determine those facts based upon the evidence.*

(*Id.* at 40–41.)

Read in context, it is crystal clear that the prosecutor did not purport to place the "prestige of the government behind its witness" or "suggest[] that information not presented to the jury support[ed] the witness' testimony." *See Doerr,* 193 Ariz. at 62, ¶ 24, 969 P.2d at 1174; *Dumaine*, 162 Ariz. at 401, 783 P.2d at 1193. Rather, he made specific reference to the trial evidence in each of his statements, and was clearly speaking in his capacity as an agent of the State.[3] *See Lee*, 185 Ariz. at 91, 932 P.2d at 697 (Prosecutor's argument "I think [the witness] was an honest man, certainly an honest man who made an honest mistake" when "read in context" did not constitute vouching); *Corona*, 188 Ariz. at 91, 932 P.2d at 1362 ("In context

[2] The trial court likely overruled this "vouching" objection because the prosecutor had completed his statement *before* the objection, "And what I believe the evidence shows well beyond any reasonable doubt - -." (R.T., Day 4, at 40.) See footnote 4, *supra.*

[3] Interestingly, during his closing argument, Appellant's counsel used the terminology, "I think," "we believe," "the defense believes," "the defense submits," and "I believe," a total of 10 times. (R.T., Day 4, at 41–42, 46–47, 49, 51–53.) Just as there was nothing improper in the prosecutor's closing argument, there was nothing improper with the argument of Appellant's counsel because he was not giving his "personal opinion," but was speaking as Appellant's agent.

. . . the prosecutor made clear that it was for the jury to 'determine the credibility of' the witnesses and her characterization of the witnesses as truthful was sufficiently linked to the evidence.") Moreover, even if the prosecutor's argument could possibly be construed as "improper," it does not come close to the level necessary to constitute a "due process" violation, or to constitute "fundamental," prejudicial error. *See, Henderson*, 210 Ariz. at 567, ¶¶ 19–20, 115 P.3d at 607; *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191. It was no mystery to the jurors that the prosecutor believed that Appellant was guilty and, as previously discussed, he tied his comments to the evidence presented at trial. Furthermore, the evidence establishing Appellant's guilt was simply overwhelming. Appellant's recorded statements to Detective Tobin, and his recorded jail calls to Lori, sealed his fate. And, when he attempted to explain away those inculpatory statements at trial, he made a complete fool of himself. Appellant's trial was nothing more than a painfully slow guilty plea. There is simply no possibility whatsoever that the prosecutor's "I" statements affected the jurors' verdicts.

Finally, the jurors were given the following instructions:

> In the opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers say is not evidence, but it may help you to understand the law and the evidence.

(R.T., Day 4, at 23.) The jurors are presumed to have followed this instruction. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006); *State v.*

LeBlanc, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). The instruction negates any possibility that Appellant was prejudiced. *See State v. Morris*, 215 Ariz. 324, 336–37, ¶ 55, 160 P.3d 203, 215–16 (2007) ("Even if he prosecutor's comments were improper, the judge's instructions negate their effect"); *State v. King*, 110 Ariz. 36, 43, 514 P.2d 1032, 1039 (1973) (holding prosecutor's expression of personal opinion regarding defendant's guilt and at least two avowals regarding the witness's credibility did not prejudice the defendant, in part, because the court instructed the jury that closing argument was not evidence).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CHOOSING NOT TO IMPOSE DISCOVERY SANCTIONS BEYOND PRECLUDING THE STATE FROM PLAYING A TAPE RECORDING OF APPELLANT'S TELEPHONE CONVERSATION FOR THE STATE'S ARGUABLE TECHNICAL VIOLATION OF RULE 15.

Appellant asserts that the trial court erred in not imposing some sort of sanction, beyond precluding the State from playing a tape recording of Appellant's telephone conversation, for the State's alleged failure to disclose to the defense, prior to Appellant testifying at trial, tapes of jail telephone calls made by Appellant while incarcerated in the Maricopa County Jail. Though the prosecutor may have committed a technical violation of Rule 15 in failing to disclose the tapes after she obtained and listened to them, the trial court acted well within its considerable discretion in electing to impose no additional discovery "sanction" beyond precluding the State from playing the tape recording.

A. STANDARD OF REVIEW.

The determination of whether to impose a sanction, and the choice of sanctions, for an alleged discovery violation rests "within the sound discretion of the trial court." *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1196 (1989); *see also State v. Meza*, 203 Ariz. 50, 55, ¶ 19, 50 P.3d 407, 412 (App. 2002) ("The trial court has great discretion in deciding whether to sanction a party and how severe a sanction to impose"). A trial court's determination will not be disturbed

on appeal "absent a clear abuse of discretion." *State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993).

B. MATERIAL FACTS.

At some point, during trial, the prosecutor obtained and listened to tape recordings of telephone conversations Appellant engaged in while incarcerated in the Maricopa County Jail. (R.T. 1/30/06, at 4, 7–9.) One of those conversations was between Appellant and his girlfriend, Cindy Mercado, and the telephone conversation took place on May 10, 2005, the first day of trial. (*Id.* at 4.) During the course of that conversation, Appellant apparently told Mercado to write down questions for Appellant's counsel to ask her at trial. (R.T. 5/16/05, at 68, 85–86; R.T. 1/30/06, at 2–4, 7–8.)

On the second day of trial, the State called Mercado to testify. (R.T. 5/11/05, p.m., at 84.) Toward the end of her direct examination, the prosecutor questioned Mercado as follows:

> Q. Have you talked [to Appellant] about this case?
>
> A. I mean, like, when I don't come to Court and the stuff I will – – I will have him call his dad's house and ask him, you know, what happened today, and, you know, this and that and...
>
> Q. What I'm asking is, have you and the defendant ever, since that night, talked about what happened that night?
>
> A. No.
>
> Q. No?

A. I mean, like, now, you know, he will be, like -- they trying and say --

Q. I don't want you to tell me stuff about what you might say. But are you telling us that you, I guess, have not spoken about what happened that night?

MS. STEWART: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: We had talked about it. We don't get specific about it. I mean, because he doesn't get that much phone time, so I would rather be talking about something other than I mean...

BY MS. SHERMAN:

Q. So he never talked to you about what you were going to come in and say?

A. No.

(*Id.* at 108–09.)

On December 16, 2005, Appellant elected to testify in his defense and, during cross-examination, he and the prosecutor engaged in the following colloquy:

Q. And did you talk to [Cindy Mercado] about her testimony at all?

A. No.

Q. You didn't?

A. No.

Q. You didn't tell her to write down questions to give Ms. Stewart to ask her when she was on the stand?

MS. STEWART: Objection; foundation.

THE COURT: Overruled.

THE WITNESS: I didn't ask her what?

BY MS. SHERMAN:

Q. You didn't tell her to write down questions for Ms. Stewart to ask her when she was on the stand?

A. No. I told my – – my defender that I wanted to write down questions that I wanted to ask.

Q. You know that when you talked to her on the phone it's recorded; right?

A. Yes, I do.

Q. But your testimony is that you didn't tell her to write down questions for Mr. Stewart?

A. Write down questions for Ms. Stewart to ask her.

Q. Yes.

A. Ms. Stewart's going to ask her her own questions.

Q. So you testimony is that you didn't tell her that?

A. No, not to my knowledge.

(R.T. 5/16/05, at 68–69.)

During the next recess, Appellant's counsel stated:

> MS. STEWART: And then I also just wanted to make sure that it was clear the record previously when we talked at sidebar, there were issues involving whether or not the State had information that Mr. Rice may have tried to influence one of the witnesses or previous witnesses in the case. Still I feel like that [sic] prosecutorial misconduct, that that information should have been stricken at a minimum. It could have enough influence to justify a mistrial, as well. The State never disclosed any of that information and had they actually brought out the alleged impeachment evidence so that we could see it, we would know whether or not there was a good faith basis. But as it stands right now, no one knows except for Ms. Sherman.

(*Id.* at 84–85.) The prosecutor explained that she had a "good faith basis" for asking the question based upon her listening to the "jail tapes" and hearing Appellant make the statement to Mercado. (*Id.* at 86.) She stated that she did not intend to attempt to play it at trial to impeach Appellant, and was stuck with Appellant's denial. (*Id.*)

The trial court inquired of Appellant's counsel if she was moving for a mistrial based upon prosecutorial misconduct, and she replied:

> MS. STEWART: At a minimum I think that the Jurors should be told that that information should be stricken because there wasn't any other evidence that, you know, they were presented with to actually prove up those allegations. At – – you know, if you're not willing to do that, then I think a mistrial would be appropriate.

(*Id.* at 87.) The prosecutor suggested that she go to her office, retrieve the tapes, re-open her cross-examination, and play the tape in court. (*Id.*) The court then ruled as follows:

> THE COURT: I just didn't know exactly what the defense was asking the Court to do.
>
> The Court will take no action with respect to striking the question -- the questions asked by the prosecutor and the responses given by the defendant. Obviously, the *counsel can't go beyond the record.* And say we have jail tapes that say something different, obviously, *you can't do that.* So the record is what it is. *The questions were asked and they were denied.* And if what the defense was asking for was a mistrial, then the motion for mistrial is denied, as well.

(*Id.*, emphasis added.)

C. ANALYSIS.

It is debatable whether Appellant raised a timely Rule 15 discovery claim—probably because it is a close call whether there was a Rule 15 violation.[4] Rule 15.1(b)(2) requires that the State disclose, "All statements of the defendant." Disclosure must be made "30 days after arraignment." Rule 15.1(c)(1), Ariz. R. Crim. P.[5] Rule 15.6(c) of the Arizona Rules of Criminal Procedure provides that, "The duties prescribed in this rule shall be continuing duties and each party shall

---

[4] In his motion to vacate judgment, filed 7 months after trial, Appellant subsequently asserted that "The State's failure to disclose the jail calls prior to trial violates not only Rule 15.1(b)(1) and Rule 15.1(b)(2) of the Arizona Rules of Criminal Procedure, but also [various State and Federal constitutional rights]." (R.O.A., Item 113, at 4.) However, no Rule 15 *claims* were raised because such claims may not be litigated pursuant to Rule 24.2(a) of the Arizona Rules of Criminal Procedure, and Appellant was limited to the ground, "That the conviction was obtained in violation of the United States or Arizona Constitutions." Rule 24.2(a)(2), Ariz. R. Crim. P. Moreover, at that point, any claimed discovery violation was forfeited and waived. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

[5] A "statement" is defined to include, "A mechanical, electronic or other recording of a person's oral communications or a transcript thereof[.]" Rule 15.4(a)(1)(ii).

make additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered." However, Rule 15.6(c) of the Arizona Rules of Criminal Procedure provides, "Unless otherwise permitted, *all* disclosure required by this rule *shall be completed at least seven days prior to trial.*" (Emphasis added.) And, Rule 15.6(d) provides:

> **d. Disclosure After the Final Deadline.** A party *seeking to use material and information* not disclosed at least seven days prior to trial shall obtain leave of court by motion, supported by affidavit, to extend the time for disclosure and use the material or information. If the court finds that the material or information could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery, the court shall grant a reasonable extension to complete the disclosure and grant leave to use the material or information. Absent such a finding, the court may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information, and if granted the court may impose any sanction other than preclusion or dismissal listed in Rule 15.7.

(Emphasis added.) Finally, the comment to Rule 15.7 of the Arizona Rules of Criminal Procedure—the rule pertaining to sanctions for discovery violations—provides:

> *In assessing whether information was not disclosed within the time limits because it was recently discovered*, the court should apply the standards of Rules of Criminal Procedure 24.2 and 32.1 for claims of newly discovered material facts. The information must have been discovered by the non-disclosing party after the Rule 15 deadline, and the non-disclosing party must have exercised due diligence in discovering the evidence. In essence, the non-disclosing party must demonstrate that the evidence was either *not in existence prior to the discovery deadline*, or could not have been discovered through the exercise of due diligence prior to the deadline.

(Emphasis added.)

Thus, the prosecutor could reasonably conclude that, since she did not possess the jail tapes at least 7 days prior to trial,[6] and had no intent to play the tapes at trial, she did not have to disclose the tapes under Rule 15.1(b)(2). At any rate, that is apparently what the prosecutor believed, and Appellant's counsel did not dispute that belief. (R.T. 5/16/05, at 85–87.) Nevertheless, as acknowledged by the prosecutor after having sufficient time to ponder the matter with the benefit of hindsight, she should have disclosed the tape recording prior to cross-examining Appellant. (R.T. 1/30/06, at 7–8.) Appellee believes that the best reading of Rule 15 required that the prosecutor disclose the recordings to Appellant's counsel as soon as practicable after she obtained and listened to them pursuant to Rule 15.1(b)(2), and the continuing duty to disclose pursuant to Rule 15.6(a), regardless of whether she intended to use the recordings at trial.

---

[6] The duty to disclose applies only "to material and information in the possession or control" of the prosecutor, members of the prosecutor's staff, and "[a]ny law enforcement agency which has participated in the investigation of the case and is under the prosecutor's discretion or control," and "[a]ny other person who has participated in the investigation or evaluation of the case and who is under the prosecutor's direction or control." Rule 15.1(f), Ariz. R. Crim. P., *see also Carpenter v. Superior Court*, 176 Ariz. 486, 489–90, 862 P.2d 246, 249–50 (App. 1993). This case was investigated by the Phoenix Police Department, not the Maricopa County Sheriff's Office. Moreover, even if the operations division of the Maricopa County Sheriff's Office had investigated the case, the custody (jail) division is clearly not "under the prosecutor's direction or control." Therefore, the duty to disclose did not arise until the prosecutor obtained possession of the tapes.

Therefore, the issue boils down to whether the trial court clearly abused its discretion in electing not to impose a discovery sanction under Rule 15.7(a), beyond precluding the State from playing the recording at trial. The "remedy" sought by Appellant was to strike the "information" and instruct the jurors that "there wasn't any other evidence that, you know, they were presented with to actually prove up those allegations." (R.T. 5/16/05, at 87.) In the alternative, Appellant requested that the trial court grant a mistrial. (*Id.*)

Ordering the "information" stricken and telling the jurors that there was no evidence presented to "prove" it would only serve to highlight the matter and confuse the jurors. The Arizona Supreme Court has held that, "Where denials to questions on cross-examination are uncontradicted by the cross-examiner, the denial itself can serve to cure any error or prejudice." *State v. Madsen*, 125 Ariz. 346, 350, 609 P.2d 1046, 1050 (1980). Thus, the trial court wisely elected to allow Appellant's denial to stand, while precluding the State from impeaching Appellant by playing the recording. For the same reasons, the trial court did not abuse its discretion in refusing to grant a mistrial.

Appellant's reliance upon *State v. Holsinger*, 124 Ariz. 18, 601 P.2d 1054 (1979) for the proposition that the prosecutor "improperly communicated harmful insinuations designed to undermine [Appellant's] credibility [sic] yet offered no supporting evidence," (Opening Brief at 15), is entirely misplaced. In *Holsinger*,

the prosecutor asked a witness, "Did I tell you that Jeanne Holsinger had a long criminal record and that's why I wanted to get her?" *Id.* at 20, 601 P.2d at 1056. The Arizona Supreme Court reversed because: (1) the defendant's criminal history was inadmissible, and highly prejudicial; and (2) "The prosecutor's question clearly implied that the defendant had a long criminal record when, in fact, she did not." *Id.* at 20–21, 601 P.2d at 1056–57. In the present case, Appellant's telephone statement *would* be admissible to impeach him, but for a then undetermined, arguable discovery violation and, more importantly, the prosecutor knew that Appellant made the statement because she heard it and, therefore, had a good faith basis to ask the question.

This case is virtually identical to that presented to the supreme court in *Madsen.* In that case, the prosecutor cross-examined the defendant's father regarding "marital discord" between defendant and his wife (the murder victim) and, specifically, a call to the sheriff's office to quell a "family fight" between the defendant and his wife. 125 Ariz. at 349–50, 609 P.2d at 1049–50. The witness denied being aware of any marital discord, as well as any visit by the sheriff's office to quell a family fight. *Id.* at 350, 609 P.2d at 1050. The prosecutor was unable to call the officer to impeach the witness, and knew it when he asked the questions. *Id.* After the witness testified and the defense rested its case, the defendant moved for a mistrial on the ground that the prosecutor's questions

"assumed, by innuendo, that the sheriff's office had been called to quell a family fight between [the defendant and his wife]." *Id.* The trial court denied the motion. *Id.*

On appeal, relying upon *Holsinger*, the defendant asserted that the prosecutor improperly insinuated facts he could not prove. *Id.* The supreme court noted that, in *Holsinger*, it had "disapproved of the practice of asking questions that had no basis in fact and could not be adequately rebutted by testimony or instructions from the court." *Id.* The court wrote:

> We held that both the question and the facts inferred in *Holsinger*, supra, were improper. In the instant case, the cross-examination by the prosecutor was a good faith attempt to elicit answers which the State had reason to believe would be forthcoming and which would also be admissible. When Mr. Madsen made his denial, the prosecutor made no attempt to contradict the denials made by Mr. Madsen.
>
> Even though the prosecutor did not have available a witness to corroborate the fact implied by the questions on cross-examination, we do not believe that defendant has been prejudiced. The witness denied the inferences contained in the question and his denials were not challenged in any way. Where denials to questions on cross-examination are uncontradicted by the cross-examiner, the denial itself can serve to cure any error or prejudice.

Id. (citations omitted.) That is precisely what occurred in this case.

Also meritless, and bereft of any supporting legal authority or analysis, is Appellant's assertion that the questioning somehow "encroach[ed]" on Appellant's "attorney-client privilege." (Opening Brief at 16.) Nothing said between

Appellant and Mercado could conceivably impinge upon "attorney-client communication." (*Id.* at 17.) And, had Appellant responded affirmatively to the prosecutor's question, it would *not* have been an admission "to manufacturing Cindy Mercado's testimony with the assistance of his attorney" (*id*), because there was never any mention, or insinuation, that Appellant's counsel requested that Mercado "write down questions" to be asked at trial. And, there is nothing untoward in suggesting that Mercado write down suggested questions to be asked by counsel, as long as her answers to those questions were truthful. It would, however, impeach Appellant's testimony that he and Mercado had not discussed her testimony, which is why the question was asked.

In conclusion while, with benefit of hindsight, there may have been a technical violation of Rule 15.1(b)(2) in failing to disclose to the defense the tapes of Appellant's jail telephone calls as soon as practicable after the prosecutor came into possession of the tapes, the trial court acted well within its considerable discretion in electing to impose no sanction beyond precluding the State from playing the tapes to impeach Appellant's testimony.

106 S.Ct. 2464
477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144, 54 USLW 4734
(Cite as: 477 U.S. 168, 106 S.Ct. 2464)

Supreme Court of the United States
Willie Jasper DARDEN, Petitioner
v.
Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections.

No. 85-5319.
Argued Jan. 13, 1986.
Decided June 23, 1986.
Rehearing Denied Sept. 3, 1986.
See 478 U.S. 1036, 107 S.Ct. 24.

State prisoner under sentence of death sought habeas corpus. The United States District Court for the Middle District of Florida, 513 F.Supp. 947, denied relief. The Court of Appeals for the Eleventh Circuit, 699 F.2d 1031,affirmed and then, 708 F.2d 646, affirmed en banc by an equally divided court. After vacating that affirmance, 715 F.2d 502, on second hearing en banc the Court of Appeals for the Eleventh Circuit, 725 F.2d 1526, reversed. The United States Supreme Court, 105 S.Ct. 1158, reversed. The Court of Appeals for the Eleventh Circuit, 767 F.2d 752, denied relief and certiorari was granted. The Supreme Court, Justice Powell, held that: (1) one juror was properly excluded for expressing religious, moral, or conscientious principles which would preclude imposition of death penalty; (2) prosecutor's improper closing argument did not deprive defendant of fair trial; (3) defendant was not denied effective assistance of counsel at penalty phase.

Affirmed and remanded.

Chief Justice Burger filed a concurring opin- ion.

Justice Brennan filed a dissenting opinion.

Justice Blackmun filed a dissenting opinion in which Justice Brennan, Justice Marshall, and Justice Stevens joined.

West Headnotes

[1] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

Trial court properly excluded juror who indicated that he had moral, religious, or conscientious principles in opposition to the death penalty so strong that he would be unable to recommend a death penalty regardless of the facts, although court's question did not track Supreme Court language, where court had repeatedly stated the correct standard when questioning other individual members of the venire in the juror's presence.

[2] Criminal Law 110 ⚿1171.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.7 k. Responsive Statements and Remarks. Most Cited Cases

Although prosecutor's closing argument was improper in attempting to place some of the blame for the crime on the Division of Corrections because defendant was on weekend furlough from a prison sentence, in commenting that the death penalty would be the only guarantee against a future similar act, and in referring to the defendant as an "animal," it did not deprive defendant of a fair trial in view of fact that comments were to some extent invited by defendant's closing argument and in view of the heavy evidence against the defendant.

[3] Sentencing and Punishment 350H ⚿ 1780(2)

767 F.2d 752 (CA11 1985), affirmed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C.J., filed a concurring opinion, *post,* at 2474. BRENNAN, J., filed a dissenting opinion, *post,* at 2475. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* at 2475.
***170** *Robert Augustus Harper, Jr.,* argued the cause and filed briefs for petitioner.

Richard W. Prospect, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith,* Attorney General.

Justice POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed. 841 (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

I

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court for Citrus County, Florida, in January 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a nonbinding recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and the sentence. Petitioner made several of the same arguments in that appeal that he makes here. With respect to the prosecutorial misconduct claim, the court disapproved of the closing argument, but reasoned that the law required a new trial "only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt ... or in which the comment is unfair." *Darden v. State,* 329 So.2d 287, 289 (1976). It concluded that the comments had not rendered ***171** petitioner's trial unfair. Petitioner's challenge to the juror exclusion was rejected without comment. Petitioner did not at that time raise his claim of ineffective assistance of counsel. This Court granted certiorari, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976), limited the grant to the claim of prosecutorial misconduct, 429 U.S. 1036, 97 S.Ct. 729, 50 L.Ed.2d 747 (1977), heard oral argument, and dismissed the writ as improvidently granted, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

Petitioner then sought federal habeas corpus relief, raising the same claims he raises here. The District Court denied the petition. ****2467***Darden v. Wainwright,* 513 F.Supp. 947 (MD Fla.1981). A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. *Darden v. Wainwright,* 699 F.2d 1031 (1983). The Court of Appeals granted rehearing en banc, and affirmed the District Court by an equally divided court. 708 F.2d 646 (1983). Following a second rehearing en banc the Court of Appeals reversed on the claim of improper excusal of a member of the venire. 725 F.2d 1526 (1984). This Court granted the State's petition for certiorari on that claim, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *Wainwright v. Witt.* 469 U.S. 1202, 105 S.Ct. 1158, 84 L.Ed.2d 311 (1985). On remand, the en banc court denied relief, 767 F.2d 752 (1985). Petitioner filed an application for a stay of his execution that this Court treated as a petition for certiorari and granted, at the same time staying his execution. 473 U.S. 928, 106 S.Ct. 21, 87 L.Ed.2d 699 (1985). We

106 S.Ct. 2464
477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144, 54 USLW 4734
(Cite as: 477 U.S. 168, 106 S.Ct. 2464)

now affirm.

II

Because of the nature of petitioner's claims, the facts of this case will be stated in more detail than is normally necessary in this Court. On September 8, 1973, at about 5:30 p.m., a black adult male entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights at a juvenile home, had awakened at about 5 p.m., had a cup of coffee at the store with his wife, and returned home to let *172 their dogs out for a run. Mrs. Turman showed the man around the store. He stated that he was interested in purchasing about $600 worth of furniture for a rental unit, and asked to see several different items. He left the store briefly, stating that his wife would be back to look at some of the items.

The same man returned just a few minutes later asking to see some stoves, and inquiring about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to the part of the store where some box springs and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door. Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, the man tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. The man left Mr. Turman faceup in the rain, and told Mrs. Turman to get down on the floor approximately five feet from where her husband lay dying. While she begged to go to her husband, he told her to remove her false teeth. He unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighbor family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her 16-year-old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip did not know *173 what she meant and asked the man to help get Turman inside. He replied, "Sure, buddy, I will help you." As Phillip looked up, the man was pointing a gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away, and was shot in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. She had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip, she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

**2468 Minutes after the murder petitioner was driving towards Tampa on Highway 92, just a few miles away from the furniture store. He was out on furlough from a Florida prison, and was driving a car borrowed from his girl friend in Tampa. He was driving fast on a wet road. Petitioner testified that as he came up on a line of cars in his lane, he was unable to slow down. He attempted to pass, but was forced off the road to avoid a head-on collision with an oncoming car. Petitioner crashed into a telephone pole. The driver of the oncoming car, John Stone, stopped his car and went to petitioner to see if he could help. Stone testified that as he approached the car, petitioner was zipping up his pants and buckling his belt. Police at the crash site

later identified petitioner's car as a 1969 Chevrolet Impala of greenish golden brown color. Petitioner paid a bystander to give him a ride to Tampa. Petitioner later returned with a wrecker, only to find that the car had been towed away by the police.

By the time the police arrived at the scene of the accident, petitioner had left. The fact that the car matched the description of the car leaving the scene of the murder, and that the accident had occurred within three and one-half miles of the furniture store and within minutes of the murder, led police*174 to suspect that the car was driven by the murderer. They searched the area. An officer found a pistol-a revolver-about 40 feet from the crash site. The arrangement of shells within the chambers exactly matched the pattern that should have been found in the murder weapon: one shot, one misfire, followed by three shots, with a live shell remaining in the next chamber to be fired. A specialist for the Federal Bureau of Investigation examined the pistol and testified that it was a Smith & Wesson .38 special revolver. It had been manufactured as a standard .38; it later was sent to England to be rebored, making it a much rarer type of gun than the standard .38. An examination of the bullet that killed Mr. Turman revealed that it came from a .38 Smith & Wesson special.

On the day following the murder petitioner was arrested at his girl friend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Phillip Arnold selected petitioner's picture out of a spread of six photographs as the man who had shot him. [FN1] By that time, a Public Defender had been appointed to represent petitioner.

> FN1. There are some minor discrepancies in the eyewitness identification. Mrs. Turman first described her assailant immediately after the murder while her husband was being taken to the emergency room. She told the investigating officer that the attacker was a heavy set-man. Tr. 237. When asked if he was "neat in his appearance, clean-looking, clean-shaven," she responded "[a]s far as I can remember, yes, sir." *Ibid.* She also stated to the officer that she thought that the attacker was about her height, 5'6" tall, and that he was wearing a pullover shirt with a stripe around the neck. *Id.*, at 227. The first time she saw petitioner after the attack was when she identified him at the preliminary hearing. She had not read any newspaper accounts of the crime, nor had she seen any picture of petitioner. When she was asked if petitioner was the man who had committed the crimes, she said yes. She also repeatedly identified him at trial.
>
> Phillip Arnold first identified petitioner in a photo lineup while in the hospital. He could not speak at the time, and in response to the written question whether petitioner had a mustache, Phillip wrote back "I don't think so." *Id.*, at 476. Phillip also testified at trial that the attacker was a heavy-set man wearing a dull, light color knit shirt with a ring around the neck. *Id.*, at 443. He testified that the man was almost his height, about 6'2" tall.
>
> A motorist who stopped at the scene of the accident testified that petitioner was wearing a white or off-grey button-down shirt and that he had a slight mustache. *Id.*, at 313, 318-320. In fact, the witness stated that he "didn't know it was that [the mustache] or the raindrops on him or not. I couldn't really tell that much to it, it was real thin, that's all." *Id.*, at 318-319. Petitioner is about 5'10" tall, and at the time of trial testified that he weighed about 175 pounds.

***175** As petitioner's arguments all relate to incidents in the course of his trial, they will be taken up, together with the relevant facts, in chronological order.

Petitioner next contends that the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the sentencing *179 determination of the reliability that the Eighth Amendment requires.

It is helpful as an initial matter to place these remarks in context. Closing argument came at the end of several days of trial. Because of a state procedural rule [FN4] petitioner's counsel had the opportunity to present the initial summation as well as a rebuttal to the prosecutors' closing arguments. The prosecutors' comments must be evaluated in light of the defense argument that preceded it, which blamed the Polk County Sheriff's Office for a lack of evidence,[FN5] alluded to the death penalty,[FN6] characterized the perpetrator of the crimes as an "animal," [FN7] and contained counsel's **2471 personal opinion of the strength of the State's evidence.[FN8]

FN4. Rule 3.250 of the Florida Rules of Criminal Procedure (1973) provided that "a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury."

FN5. "The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it." Tr. 728.

FN6. "They took a coincidence and magnified that into a capital case. And they are asking you to kill a man on coincidence." *Id.,* at 730.

FN7. "The first witness you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal." *Id.,* at 717. "And this murderer ran after him, aimed again, and this poor kid with half his brains blown away.... It's the work of an animal, there's no doubt about it." *Id.,* 731-732.

FN8. "So they come on up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses.... The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do." *Id.,* at 736-737.

The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the *180 Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred.[FN9] Some comments implied that the death penalty would be the only guarantee against a future similar act.[FN10] Others incorporated the defense's use of the word "animal." [FN11] Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case.[FN12] These comments undoubtedly were improper. But as both the District Court and the *181 original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright,* 699 F.2d, at 1036. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Donnelly v. DeChristoforo,*** **416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed . 2d 431 (1974).** Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is " **the narrow one of due process, and not the broad exercise of supervisory power.**" *Id.,* at

642, 94 S.Ct., at 1871.

FN9. "As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons.... Can't we expect him to stay in a prison when they go there? Can we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" App. 15-16. "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." *Id.*, at 16.

FN10. "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose.-" *Id.*, 17-18.

FN11. "As far as I am concerned, and as Mr. Maloney said as he identified this man this person, as an animal, this animal was on the public for one reason." *Id.*, at 15.

FN12. "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Id.*, at 16. "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." *Id.*, at 20. "I wish someone had walked in the back door and blown his head off at that point." *Ibid.* "He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself." *Id.*, at 28. "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." *Id.*, at 29. "[D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat." *Id.*, at 31. After this, the last in a series of such comments, defense counsel objected for the first time.

[2][3] Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial.[FN13] The **2472 prosecutors' argument *182 did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See *Darden v. Wainwright,* 513 F.Supp., at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Id.*, at 13, 105 S.Ct., at 1045. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," 329 So.2d, at 291, reduced the likelihood that the jury's decision was influenced by argument. Finally, defense counsel made the tactical decision not to present any witness other than petitioner. This decision not only permitted them to give their summation prior to the prosecution's closing argument, but also gave them the opportunity to make a final rebuttal argument. Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in

inflamed passions against petitioner. *183 [FN14] For these reasons, we agree with the District Court below that "Darden's trial was not perfect-few are-but neither was it fundamentally unfair." 513 F.Supp., at 958.[FN15]

FN13. Justice BLACKMUN's dissenting opinion argues that because of prosecutorial misconduct petitioner did not receive a fair trial. The dissent states that the Court is "willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe." *Post,* at 2476. We agree that the argument was, and deserved to be, condemned. *Supra,* at 2471. Conscientious prosecutors will recognize, however, that *every court* that criticized the argument went on to hold that the *fairness* of petitioner's trial was not affected by the prosecutors' argument.

On direct appeal in 1976, the Florida Supreme Court so held after a careful review of the "totality of the record." *Darden v. State,* 329 So.2d 287, 290-291. On the first federal habeas petition, the District Court considered the prosecution's closing argument at length and denied the petition. It concluded after a "thorough review of the record" that it was "convinced that no relief is warranted." *Darden v. Wainwright,* 513 F.Supp. 947, 958 (MD Fla.1981). "Darden's trial was not perfect-few are-but neither was it fundamentally unfair." *Ibid.* The original panel of the Court of Appeals affirmed the District Court's holding with respect to the prosecutors' argument. It stated that it had "considered the prosecutors' remarks and evaluated them in light of Darden's entire trial," and that it "agree[d] with the district court's conclusion that the prosecutors' comments did not deny Darden a fundamentally fair trial." 699 F.2d 1031, 1036-1037 (1983). When the Court of Appeals reheard the case en banc for the second time it expressly agreed with the panel decision on the prosecutorial misconduct issue. 725 F.2d 1526, 1532 (1984).

The Court of Appeals, however, reversed the District Court on the *Witherspoon* issue. This Court granted the State's petition for certiorari only on that issue, and vacated and remanded the case for reconsideration in light of *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The Court of Appeals denied all relief, 767 F.2d 752 (1985). During this protracted litigation not one court has agreed with petitioner's claim with respect to improper prosecutorial argument.

FN14. "Mr. McDaniel made an impassioned plea ... how many times did he repeat [it]? I wish you had been shot, I wish they had blown his face away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him." Tr. 791; see also *id.,* at 794.

One of Darden's counsel testified at the habeas corpus hearing that he made the tactical decision not to object to the improper comments. Based on his long experience with prosecutor McDaniel, he knew McDaniel would "get much more vehement in his remarks if you allowed him to go on." By not immediately objecting, he hoped to encourage the prosecution to commit reversible error. Supp.App. 46-47.

FN15. Justice BLACKMUN's dissenting opinion mistakenly argues that the Court today finds, in essence, that any error was harmless, and then criticizes the Court for

not applying the harmless-error standard. *Post,* at 2479-2480. We do not decide the claim of prosecutorial misconduct on the ground that it was harmless error. In our view of the case, that issue is not presented. Rather, we agree with the holding of every court that has addressed the issue, that the prosecutorial argument, in the context of the facts and circumstances of this case, did not render petitioner's trial unfair-*i.e.,* that it was not constitutional error.

Petitioner also maintains that the comments violated the requirement of reliability in the sentencing process articulated in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The principles of *Caldwell* are not applicable to this case. *Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments "presen[t] an intolerable danger that the jury will in fact choose to minimize the importance of its role," a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. *Id.,* at 333, 105 S.Ct., at 2641-42.

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence. But petitioner's reliance on *Caldwell* is even more fundamentally mistaken than these factual differences indicate. *Caldwell* is relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to *increase* the jury's perception of its role. We therefore find petitioner's Eighth Amendment argument unconvincing.

***184 **2473** V

[4][5] Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of trial. That claim must be evaluated against the two-part test announced in *Strickland v. Washington,* 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.,* at 668, 104 S.Ct., at 2065. Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at 694, 104 S.Ct. 2068.

Petitioner argues that his trial counsel did not delve sufficiently into his background, and as a result were unprepared to present mitigating evidence at the sentencing hearing.

As an initial matter, petitioner contends that tri-

94 S.Ct. 1868
416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431
(Cite as: 416 U.S. 637, 94 S.Ct. 1868)

Supreme Court of the United States
Robert H. DONNELLY, Petitioner,
v.
Benjamin A. DeCHRISTOFORO.

No. 72-1570.
Argued Feb. 20, 1974.
Decided May 13, 1974.

A habeas corpus proceeding was instituted by a state prisoner. Relief was denied by the United States District Court for the District of Massachusetts, and the petitioner appealed. The Court of Appeals, First Circuit, 473 F.2d 1236, reversed and remanded. On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that in a joint murder trial during which a codefendant had, to the jury's knowledge, pleaded guilty, and the jury was told by the prosecutor and judge that the prosecutor's remarks were not evidence, the prosecutor's remark to the jury, in reference to defendant and his counsel, 'They said that they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder' was ambiguous and not so clearly prejudicial as to be unmitigated in its effect by curative instruction, and, in view of a curative instruction, there was no denial of due process.

Reversed.

Mr. Justice Stewart filed a concurring opinion in which Mr. Justice White joined.

Mr. Justice Douglas dissented and filed opinion, in which Mr. Justice Brennan and Mr. Justice Marshall joined in part.

West Headnotes

[1] Habeas Corpus 197 ⚿451

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k451 k. Supervisory or Appellate Authority. Most Cited Cases
(Formerly 197k92(1))
Review by Court of Appeals of state court conviction is narrow one of due process, and not broad exercise of supervisory power that it would possess in regard to its own trial court.

[2] Criminal Law 110 ⚿633.10

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.10 k. Requisites of Fair Trial. Most Cited Cases
(Formerly 110k633(1))
Not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes failure to observe that fundamental fairness essential to very concept of justice.

[3] Constitutional Law 92 ⚿4629

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4627 Conduct and Comments of Counsel; Argument
92k4629 k. Prosecutor. Most Cited Cases
(Formerly 92k268(8))

Criminal Law 110 ⚿2204

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to

Comments or Conduct
110k2204 k. Expressions as to Guilt of Accused. Most Cited Cases
(Formerly 110k730(9))

In joint murder trial during which codefendant had, to jury's knowledge, pleaded guilty, and jury was told by prosecutor and judge that prosecutor's remarks were not evidence, prosecutor's remark to jury, in reference to defendant and his counsel, "They said that they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder" was ambiguous and not so clearly prejudicial as to be unmitigated in its effect by curative instruction, and, in view of curative instruction, there was no denial of due process.

**1868 Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*637 During the course of a joint first-degree murder trial, respondent's codefendant pleaded guilty to second-degree murder, of which the trial court advised the jury, stating that the trial against respondent would continue. In his summation, the prosecutor stated that respondent and his counsel had said that they 'hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' Respondent's counsel objected and later sought an instruction that the remark was improper and should be disregarded. In its instructions, the trial court, after re-emphasizing the prosecutor's statement that his argument was not evidence, declared that the challenged remark was unsupported, and admonished**1869 the jury to ignore it. Respondent was convicted of first-degree murder. The State's highest court ruled that the prosecutor's remark, though improper, was not so prejudicial as to warrant a mistrial and that the trial court's instruction sufficed to safeguard respondent's rights. The District Court denied respondent's petition for a writ of habeas corpus. The Court of Appeals reversed, concluding that the challenged comment implied that respondent, like his codefendant, had offered to plead guilty to a lesser offense, but was refused and that the comment was thus potentially so misleading and prejudicial as to deprive respondent of a constitutionally fair trial. Held: In the circumstances of this case, where the prosecutor's ambiguous remark in the course of an extended trial was followed by the trial court's specific disapproving instructions, no prejudice amounting to a denial of constitutional due process was shown. Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 distinguished. Pp. 1871-1874.

1st Cir., 473 F.2d 1236, reversed.

*638 David A. Mills, Danvers, Mass., for petition- er.

Paul T. Smith, Boston, Mass., for respondent.

Mr. Justice REHNQUIST delivered the opinion of the Court.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.[FN1] The jury recommended that the death penalty not be imposed, and respondent was sentenced to life imprisonment. He appealed to the Supreme Judicial Court of Massachusetts contending, inter alia, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court affirmed.[FN2] That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to require reversal.

FN1. Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. The

conviction is in on way related to the issues before the Court in this case.

FN2. Commonwealth v. DeChristoforo, 360 Mass. 531, 277 N.E.2d 100 (1971).

Respondent then sought habeas corpus relief in the United States District Court for the District of Massachusetts.*639 The District Court denied relief, stating: '(T)he prosecutor's arguments were not so prejudicial as to deprive (DeChristoforo of his constitutional right to a fair trial.'[FN3] The Court of Appeals for the First Circuit reversed by a divided vote. [FN4] The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this conduct was a denial of due process. We granted certiorari, 414 U.S. 974, 94 S.Ct. 273, 38 L.Ed.2d 216 (1973), to consider whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights. We hold they were not and so reverse.

FN3. App. 231.

FN4. 473 F.2d 1236 (1973).

I

Respondent and two companions were indicted for the first-degree murder of Joseph Lanzi, a passenger in the car in which the defendants were riding. Police had stopped the car at approximately 4 a.m. on April 18, 1967, and had discovered Lanzi's dead body along with two firearms, one of which had been fired. A second gun, also recently fired, was found a short distance away. Respondent and one companion avoided apprehension at that time, but the third defendant was taken into custody. He later pleaded guilty to second-degree murder.

**1870 Respondent and the other defendant, Gagliardi, were finally captured and tried jointly. The prosecutor made little claim that respondent fired any shots but argued that he willingly assisted in the killing. Respondent, on the other hand, maintained that he was an innocent passenger. At the close of the evidence but before final argument, Gagliardi elected to plead guilty to a charge of second-degree murder. The court advised the jury that *640 Gagliardi had pleaded guilty and that respondent's trial would continue.[FN5] Respondent did not seek an instruction that the jury was to draw no inference from the plea, and no such instruction was given.

FN5. The trial court stated:

'Mr. Foreman, madam and gentlemen of the jury. You will notice that the defendant Gagliardi is not in the dock. He has pleaded 'guilty,' and his case has been disposed of.

'We will, therefore, go forward with the trial of the case of Commonwealth vs DeChristoforo.' App. 99.

Respondent's claims of constitutional error focus on two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury. The first involved the expression of a personal opinion as to guilt, [FN6] perhaps offered to rebut a somewhat personalized argument by respondent's counsel. The majority of the Court of Appeals agreed with the Supreme Judicial Court of Massachusetts that this remark was improper, but declined to rest its holding of a violation of due process on that remark. [FN7] It turned to a second remark that it deemed 'more serious.'

FN6. The challenged remark was: 'I honestly and sincerely believe that there is no doubt in this case, none whatsoever.' Id., at 130.

FN7. The Court of Appeals noted: '(A)t least the jury knows that the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk.' 473 F.2d, at 1238.

The prosecutor's second challenged comment